



BEING A JUDGE IN THE MODERN WORLD

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Introduction¹

It is a pleasure and an honour to have been invited to give this year's Pilgrim Fathers' lecture. I believe it is the 21st. Many congratulations on reaching this milestone. If you have spotted the body armour, I had a boating accident this summer. But, a broken back was not going to prevent my giving this lecture. It did however prevent my spending as much time coming up with fresh ideas as I should have wished. I spoke on a similar topic in Israel this week.

The focus of this lecture looks at the role of judges today, on the changing judicial role. What do we expect our judges to be? What role or roles can and do judges actually play? Are modern judges more than judges, and if so in what way or ways?

When I was called to the Bar in 1972 there was a perception, I emphasise perception, that the best way for a senior lawyer to improve his golf handicap was to go on the bench. If ever that was the case it most certainly is not the case now. Some parts of the media believe that we work only between 10.30 and 4.30 (at most) because that is when we are visible in court doing the job that judges have always done - dispute resolution. But, there are two things wrong with that assumption - first a judge does not go into a courtroom blind. Considerable preparation is required before and after a court day. Judgments and summings up do not write themselves and in our adversarial system we do not have the benefit of law clerks to assist us as many other jurisdictions do - a factor people forget when they publish stark

¹ I wish to thank John Sorabji for all his help in preparing this lecture.

headlines about the cost of legal aid. Other jurisdictions may spend less on advocates but they spend far more on judicial support.

Second, there is far more to judging these days than simply sitting in court directing the jury on what constitutes an offence or deciding which car ran into which. The law has become increasingly complex and the burdens far greater than ever before for the modern judge. This is not a cry for sympathy or attention – merely an attempt to explode myths.

The issue is one the Judicial College (which is responsible for training approximately 36,000 lay and professional judges in England Wales) set as its theme for its inaugural academic programme in 2013-2014. We asked a number of senior judges, a human rights campaigner and a legal correspondent to give their takes on the theme 'Being a judge in the modern world'. As only a lawyer could, one of the judges first considered what 'modern' meant. For the avoidance of doubt I use the term modern to mean the judge of today 2014. As you might expect all the judges focussed in part at least on the constitutional role of the judiciary. I shall, therefore, begin there.

Constitutional Role

I start with a brief look at the contrasting views of the judicial role articulated by Sir Francis Bacon, Lord Chancellor, and his great rival and eventual prosecutor, Sir Edward Coke, Chief Justice.

Bacon took what might be described as a minimalist view of the judicial role: judges were to decide cases and nothing more. He explained the position in his essay, *Of Judicature*, in this way,

Judges ought to remember that their office is *jus dicere*, and not *jus dare*; to interpret law, and not to make law, or give law ... Judges ought to be more learned than witty, more reverend than plausible, and more advised than confident. Above all things, integrity is their portion and proper virtue.²

There is, of course, a certain irony in the last sentence. Bacon was perhaps the last person to talk about judicial integrity given that he lost office as Lord Chancellor for taking bribes from litigants. But the advice to be more learned than witty was excellent advice and applies to the modern judge as much as it did to the 17th century judge. Attempts at humour account for a significant proportion of the misreporting and pillorying of judges in the popular press. For example, my friend and former colleague retired High Court judge Oliver Popplewell tried the claim by sprinter Linford Christie over doping allegations. For those who do not

² F. Bacon, *Of Judicature*, <<http://www.bartleby.com/3/1/56.html>>

remember the case and I shall put this delicately - there was a reference to Christie's physique as revealed by tight lycra running shorts. Oliver will go down in history as the judge who asked: 'What is Linford's lunchbox?' He insists he knew exactly what was meant and his remark was intended as a joke. But it haunts him nevertheless.

Back to Bacon - for him the judge's role was straightforward. Judges were not legislators: they did not make or give law. They simply interpreted it, for the benefit of the jury. Taken literally this view would not sit entirely easily with the long-established principle that the British judiciary can develop the common law; in which sense they were and are legislators. But by law making I assume Bacon was referring to the enactment of policy by legislators as opposed to the development of the Common Law.

Coke took a decidedly different approach to statutory interpretation and the relationship between the judiciary and the Crown. For Coke, the judiciary were not lions under the throne as Bacon described them but lions over the throne who through the application of the common law could set aside legislation. As he famously put it, in *Dr Bonham's Case*

In many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void, for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void.³

Coke's assertion has been criticised as invalid on numerous occasions. Whether or not he was correct in 1610 there are a number of good reasons why his view holds no water now. In *Jackson and others v Attorney General* a number of appellants with an interest in fox hunting sought to strike down the Hunting Act designed to abolish hunting of foxes with dogs. In rejecting the challenge the late, very much missed Lord Bingham observed 'The bedrock of the British constitution is ... the supremacy of the Crown in Parliament.'⁴

It is this principle that judges may pray in aid in defending their application of the ECHR. Parliament chose to enshrine the convention into English law through the Human Rights Act and therefore in upholding the Convention, judges are not thwarting the will of Parliament. They are implementing it. If Parliament does not like the way the Law is developing, it can change the law. The UK courts cannot, in general, set aside legislation.

³ (1610) 8 Co Rep 107.

⁴ [2006] 1 AC 262 at [9];

However there have been a number of developments that have led some to argue that our Supreme Court is evolving into a Constitutional Court which might one day be tempted, in effect, to declare an Act unconstitutional.

We already have two situations in which the courts can engage in judicial review of legislation in the UK. The first arises under the European Communities Act 1972, the second under the Human Rights Act 1998. Under the former, the courts may review, and if necessary, strike down UK legislation that is contrary to European Union law. Under the latter, the courts may review legislation to ascertain whether it is consistent with rights guaranteed by the European Convention on Human Rights. It may not strike down primary legislation, but may declare it to be incompatible - thus leaving it to the government and Parliament to decide whether to rectify the declared defect, or not. In both cases the judiciary is not acting under a power granted by the Constitution. It is acting under a power provided by Parliament itself.

There have been relatively few final declarations to date. The area which has caused considerable political controversy is the reliance on the HRA to overturn administrative decisions in applications for judicial review.

The growth in administrative work has been one of the major changes in my time as a lawyer. When I studied law most judges would not see an application for Judicial Review from one end of their career to another. Today large numbers of tribunal judges and most if not all our QBD High Court judges have to sit on admin cases because of the flood of work. Some ministers (often at the sharp end of litigation) feel the pendulum has swung too far and many of the claims are totally unmeritorious. Others argue that proposed limitations on Judicial Review could lead to injustice and would be contrary to the Rule of Law.

In my view one of the reasons the Human Rights Act has provoked such controversy is because it imports philosophical concepts into the Law with which the judges must grapple and about which there is ample scope for disagreement as in the right to a private and family life. One man's claim to a family life is another man's headline- 'Catgate'. You may remember the row about whether a Bolivian National was allowed to stay in the UK because of his attachment to his pet cat. I don't intend to explore the rights and wrongs of that particular decision but we are often faced with highly complex personal situations where legal training and precedent can take you only so far.

How does a judge balance the interests of the public in deporting a dangerous criminal to his home country with the interests of the dangerous criminal who faces almost certain death if deported, in a way which will meet with universal approval?

How well equipped is a court, even the most senior court in the land or in Europe,

- to decide whether the right to life encompasses the right to choose death
- to decide whether a pair of Siamese twins should be separated in an operation that would save the life of one but kill the other
- or to decide who should have the care of a child born to a surrogate mother? These are the kind of decisions which as a result of the HRA and scientific developments increasingly come the way of the modern judge.

I can however reveal that the court had little difficulty with the claim to a family life from a convicted drug dealer who fought deportation on the basis he had fathered 10 children by several different women in between his regular stays at HM pleasure. His family life consisted more of visiting time at Wormwood Scrubs.

To read the press you might think the judges take a perverse delight in allowing dangerous men to walk the streets of England. We do not. We may not always get things right in balancing the interests of the individual with the interests of society as whole - as I say there is ample scope for disagreement - but we do our honest best to interpret what Parliament has laid down not strike it down.

In October the House of Lords debated the report stage of the Criminal Justice and Courts Bill which contains provisions to limit judicial review. In legal and political circles it is a hot topic and I do not intend to enter much further into the fray.

I will say only this about the proposed limitations on Judicial Review - I hope that considered and constructive debate can produce a solution which meets the Government's concerns (not all of which would be dismissed as groundless by a judge sitting in the administrative court) without significantly undermining the principle of Judicial Review. It is generally accepted that in any well-functioning democracy there must be an effective mechanism through which executive action can be subject to scrutiny.

A novel form of Judicial Review has recently supplemented these forms of Judicial Review; novel at least in so far as the UK is concerned. Since the late 1990s the UK Parliament has devolved a number of powers to Scotland, Wales and Northern Ireland. Such devolution has

provided legislative competence to the Scottish Parliament, Welsh and Northern Irish Assemblies.⁵ The devolution legislation provides the UK Supreme Court with a unique power to engage in ex ante legislative review. A Law Officer of the Crown, say the Attorney-General of Northern Ireland, may refer a Bill from the Northern Irish Assembly, to the UKSC before it completes its legislative passage. The aim of the review is to ascertain whether the Bill is within the legislative competence of the devolved legislature. If the answer is yes, then there is nothing to stop the Bill completing its passage. If the answer is no, the Bill must be revised. The power has now been used a number of times.⁶

Questions of policy remain solely within the realm of the executive and legislature, but all three branches must conclude that the technical, legal, power to enact the legislation exists. It will be interesting to see how this new jurisdiction develops.

I turn to other developments in the court room.

The Modern Judge as Case Manager

The judicial role has in recent times undergone what could be described as an administrative turn. It is no longer confined, as it used to be in the common law world, with deciding cases based on the evidence and argument set before the court by litigants. The days of the judge as passive umpire are long gone.

Since at least the 1990s in England and Wales, the power to control the pace and nature of the proceedings has been eroded and replaced by active case management by the courts. The case management powers granted to civil judges give courts the power to set the pace of litigation, through fixing procedural and trial timetables, limiting the amount of evidence that is subject to disclosure so that it is proportionate to the case, restricting expert evidence and encouraging mediation. It also now requires the court to act, as Sir Rupert Jackson put it in his Costs Review, as a project manager.

As Sir Rupert put it, 'All participants in a project must be aware of the budget for the project and aware of the budgetary consequences of what they do.'⁷ This is to be achieved by both parties submitting costs budgets to the court and as far as possible being required to stick to

⁵ See, for instance, Scotland Act 1998; the Northern Ireland Act 1998; and the Government of Wales Act 2006.

⁶ See for instance, *Local Government Byelaws (Wales) Bill 2012 – Reference by the Attorney-General for England and Wales* [2012] UKSC 53, [2013] 1 AC 792.

⁷ Ibid.

them. It is hoped that costs will be managed prospectively, rather than assessed after the event. This role inevitably draws the judge into the litigation process far more.

Andrew Mitchell MP who came into conflict with police officers at the gates of Downing Street in the row known as Plebgate and sued a newspaper about its reporting of the incident and aftermath discovered to his cost, or rather to his lawyers' cost, that the courts will enforce deadlines. In a highly controversial decision the CA ruled that a very large sum of money which might have been recoverable by way of costs had deadlines been met were not recoverable because his lawyers failed to comply with the court's directions.

The judges are also being drawn far more into the trial process by the increase in numbers of Litigants in Person. Cutbacks in public funding have led to an explosion of LIPS in the courts. Again I do not wish to enter the political arena but this does cause problems for the judge. An adversarial system depends in general on the parties putting the case before the judge. However, even the most intelligent and educated Litigant In Person may fail to understand how to put their case effectively and may take far too long to do it. What is the judge to do? He or she does not want to send away a LIP empty handed if they have a good case but the other side is entitled to fair treatment also. If the judge leans over backwards too far to help the LIP, the LIP's opponent may have cause for complaint. Judging cases with LIPs involve a whole new set of skills which my predecessors would have required but rarely.

Developments Outside the Courtroom -Leadership and Management

Developments in the judicial role are not confined to the courts and court process. They have a purely administrative aspect. Historically, judges have always been involved in certain aspects of the administration of the justice system.

However, this administrative role has expanded exponentially as a consequence of 2005's Constitutional Reform Act (CRA). The CRA transferred a wide range of duties previously carried out by the Lord Chancellor to the Lord Chief Justice. The LCJ has been obliged to establish what could be called a judicial administration, or executive- known as the Judicial Office. There are officials reporting to the Lord Chief in human resources matters, appointments, budgeting, strategy and the like. Judges all around the country spend significant amounts of their time on every aspect of efficient judicial administration from judicial training, to human resources, to diversity, to the board of Her Majesty's Courts and Tribunals Service. Recently the Master of the Rolls announced 30 to 40 per cent of his time is spent on administration. The LCJ and the Senior Presiding Judge sit hardly at all. The

number of judges remains static and the court work has gone up not down - so that the same number of judges have to fulfil all these functions at the same time as maintaining the quality of service to the public.

Modern Technology

To some extent we are assisted in our court and out of court functions by the provision of IT. I would hate to destroy your picture of the crusty port soaked British judge sitting in his full bottomed wig and wielding his quill pen but many of us are relatively switched on when it comes to technology. Maybe not as switched on as the average 10 year old but perhaps as switched on as the average 50 year old.

We beg for modern technology to improve our service to the public and to reduce costs. Many of us encourage the parties to send us documents in electronic form, use technology to present evidence and use video links where possible. In the Court of Appeal Criminal Division, where I preside, we have been piloting paperless courts. However, I cannot say the technology we have been given, to date, is the most up to date - my son who is in the internet business saw the equipment provided for me and questioned if Noah had used it in the Ark. Harsh but I took his point. We have been promised better.

Technology is also changing the nature of the cases in front of us particularly in crime and the investigation of crime. We face new criminal offences - such as online bullying, identity theft by hacking, jurors who research the cases they are trying on the internet and online conspiracies to abuse children. Developments in DNA testing have made a huge difference but so have the use of social media, the spread of Closed Circuit Television Cameras, and mobile telephones. In one case recently, a young woman thought she recognised her boyfriend's attacker. In the ambulance on the way to hospital she went on to Facebook and by the time the police arrived she had a name and a face for them. Good for the investigation but a bit more difficult for judges used to carefully controlled ID procedures developed over decades.

As for mobile telephone evidence and CCTV - hardly a criminal trial comes to court these days without one or both. I had an appeal in a murder trial where 5 men were convicted entirely on mobile phone evidence. Analysis of calls made, messages left and cell sites off which mobile phone signals bounced showed an unmistakeable pattern, as the mobile phone users plotted the crime, drove out of London to a small town in the country in three cars to commit the crime and drove away afterwards discussing what had happened on their way home.

Communication and Relationship with the Public

Advances in Technology have also changed our relationship with the public. We live in a world of instant communication and a demanding media - our link to the public. When preparing this lecture I asked a newly appointed friend what she felt was the most difficult thing about being a judge in the modern world. She felt that it was getting the balance right between being open and approachable to the court user, the press and the public and maintaining the appropriate level of judicial reserve. As she commented - I don't expect the murderer I have just sentenced to 40 years to be my friend.

There are still some journalists who mistake that reserve for being out of touch. In any event they prefer the stereotypical image of the crusty port soaked out of touch judge with his quill pen to which I referred earlier. It makes for a better story. Sadly reporting is not always constructive and sensible. At the slightest some journalists will leap on a decision of which they disapprove or an ill advised judicial comment (hence the earlier reference to heed Bacon's advice about avoiding the temptation to be witty). Some descend to personal abuse.

Couple that with the fact many stories are reported without facts being properly checked and the damage is done, as any victim of defamation can confirm. A judge's reputation is sullied and there is another nail in the coffin of public confidence in the judiciary. I give one example - a judge gave the maximum sentence he could in accordance with the law - he was pilloried in the press and by politicians for being overly lenient. He and his family were door-stepped. His experience was not uncommon. That is increasingly the life of the modern judge.

We try to head off this kind of attack by making our decisions and our reasoning as clear as possible. We allow tweeting in court, we issue summaries of the decision where appropriate and alert the Judicial Communications Office to high profile cases so they can offer the press assistance in understanding what has happened. We have allowed some broadcasting of appeals. But still the misreporting occurs. I do not suggest we are above criticism - far from it. It is the terms of the criticism to which I object and the failure to check facts. It is also the impact upon public confidence which concerns me.

We have one of the best justice systems in the world - a system the government rightly intends to flaunt next year when we celebrate the 800th anniversary of the signing of the Magna Carta. It is a system worth billions to the UK economy. It is a precious thing to the UK's citizens yet it does not seem to be a priority with many politicians of whatever political hue. The modern judge has a fight on his or her hands to ensure that standards do not drop.

Extra curricular Judicial Comment

Further, the modern judge has been known to use an opportunity such as giving a lecture of this kind to make that kind of point. This too is relatively new. Before the CRA 2005 it would have been the Lord Chancellor's job to speak up for the judges. It would also have been his job (it has always been a he) to speak up for the judiciary generally. The Kilmuir Rules prevented judges speaking up for themselves. The Rules date back to 1955 when Lord Kilmuir then Lord Chancellor, declined a BBC request for judges to participate in a series of programmes, on the basis that...

the overriding consideration in the opinion of myself and of my colleagues is the importance of keeping the Judiciary in this country insulated from the controversies of the day. So long as a Judge keeps silent his reputation for wisdom and impartiality remains unassailable: but every utterance which he makes in public, except in the course of the actual performance of his judicial duties, must necessarily bring him within the focus of criticism.

Note the assertion that a judge will only keep his/her reputation for wisdom if they keep their mouths shut. There may be something in that.

In 1987 Lord Chancellor Lord Mackay abolished the Kilmuir Rules. And with one bound they were free. There was such a flow of speeches and lectures from judges that Lord Neuberger then MR in 2012 cautioned about too many of them. 'There are rather a lot of judicial speeches being made at the moment,' he acknowledged. 'I wonder whether we are not devaluing the coinage, or letting the judicial mask slip. In the light of the fact that I may be characterised as a serial offender, perhaps the less I say about that point, the better.'

But, if the likes of Lord Neuberger and other serving judges do not speak out on important issues which impact upon the justice system, who will? There are a few retired judges and a few ennobled lawyers and concerned citizens who can and do use the House of Lords as a platform, but the serving judiciary, who encounter the problems day in and day out, have no obvious forum to air their views. The Lord Chancellor is no longer top judge and able to represent their views in Cabinet and serving judges may not speak in the House of Lords.

The problem is that the vast majority of issues upon which the judges may wish to speak are likely to have a political dimension - I have touched on two this evening: legal aid cuts and the Human Rights Act. Judges have a truly and properly vested interest in both. But if they speak - do they risk entering the political arena and a collision course with politicians which could only end badly.

Conclusion

Some might suggest that being a judge in the modern world today is no different from being a judge in the last century. The judiciary remains the third arm of the state ensuring that members of the Executive do not set themselves above the law, that the citizen can enforce his or her rights and that the criminal justice process operates fairly and effectively. Judges still on occasion stray from the courtroom and dispute resolution, as they always have done.

But, the truth is expectations and roles have changed significantly; and those changes have not have been appreciated by all. The human rights campaigner Shami Chakrabati in her Judicial College lecture attributed this to what she called the constitutional illiteracy of many in politics and in the media. It is most unfortunate that not all those who have power and influence understand what is happening to our justice system. If no other argument holds sway, maybe they will listen to the economic one.

When you hear a politician proudly celebrating the Magna Carta and the Rule of Law next year you may ask him or her 'and what have you done to ensure the survival of a quality justice system?'. Maybe you could ask, as some of you will recall Tony Hancock asked: 'Magna Carta – did she die in vain?'

Thank you